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# Cell Phones and Everything Else: Criminal Law Cases in the Supreme Court's 2013-2014 Term

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As in the past few years, most of the action in the Supreme Court's 2013-2014 Term was on the civil side of the docket. On the criminal side, the undisputed blockbuster was *Riley v. California*,[1] a seminal ruling about searches of cell phones incident to arrest. *Riley* is significant for several reasons, not the least of which is that it displays the justices' understanding of new technologies (at last!) and their recognition that cases involving today's technologies are difficult to decide by simple reference to the brick-and-mortar world. This article starts with *Riley* and other Fourth Amendment decisions then moves to the Court's Fifth, Sixth, and Eighth Amendment rulings and to a smattering of federal criminal and habeas cases. It concludes with a brief preview of the 2014-2015 Term.

### FOURTH AMENDMENT

The Court issued an interesting assortment of Fourth Amendment rulings last Term. *Riley* was the most significant holding, though there were also important opinions addressing traffic stops and anonymous tips, warrantless entries into the home, and the use of deadly force during high-speed chases.

### WARRANTLESS SEARCHES OF CELLULAR PHONES

*Riley v. California*, which was consolidated with *United States v. Wurie*, involved the searches incident to arrest of two cellular phones. In the first case, Riley was arrested following a traffic stop. He had a "smart phone" in his pants pocket. About two hours after the arrest, a detective examined the contents of the phone. The detective found videos and photographs, which eventually connected Riley to a shooting. In the second case, defendant Wurie was arrested for a suspected drug sale. At the station house, officers seized a "flip phone," a now somewhat quaint form of technology, and noticed that the phone was receiving calls from a source identified as "my house." Using the call log on the phone, officers identified the defendant's apartment. In a subsequent warrant search, police seized narcotics, a firearm, and cash. The question in both cases was whether law enforcement officers could obtain the data from the cell phones without warrants. In a unanimous decision, the Court held that warrants are required before searching cell phones that are seized incident to arrests.

Chief Justice Roberts's opinion is a primer on the search-incident-to-arrest doctrine, which is an exception to the warrant requirement. In *Chimel v. California*,[2] the justices found that officers who arrest a suspect inside a home may search the area within the suspect's immediate control but may not conduct a warrantless search of the remainder of the home. Such an extensive search did not fit within the exception to the warrant requirement "because it was not needed to protect officer safety or to preserve evidence."[3] Then in *United States v. Robinson*,[4] the Court applied *Chimel* to uphold the search of a cigarette pack on an arrestee's person. *Robinson* categorically approved the search without requiring any individualized showing of need to protect officer safety or preserve evidence. More recently, in *Arizona v. Gant*,[5] the Court narrowed the search-incident-to-arrest exception in the context of automobile searches, holding that it authorizes a warrantless search only when the arrestee is unsecured and within reaching distance of the passenger compartment or when it is reasonable to believe that evidence relating to the crime of arrest is in the car. Drawing on these cases and others, the Chief Justice derived the general rule that exempting a type of search from the warrant requirement requires an assessment of "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests."[6] "[W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects," that rule should not be extended to searches of digital content on cell phones.[7]

Officers are free to examine the physical aspects of a cell phone to ensure that it cannot be used as a weapon. However, digital data stored on a phone do not pose a risk to officers. While there may be a risk of destruction of evidence, such as by remote wiping, officers may take reasonable measures to minimize the risk, such as turning off phones or placing them in Faraday bags.[8] On the other side of the balance, "cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, wallet, or a purse."[9] The Court recognized that many cell phones are more like minicomputers with telephone capability. Phones collect distinct types of information, such as addresses, notes, bank statements, and videos, which may tell more in combination that any single record. In addition, the whole of a person's life can be reconstructed through thousands of photographs labeled with dates, locations, and descriptions, which is different than what may be gleaned from a few photographs in a wallet. Phones are pervasive. "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day."[10] And phones may also link to files stored in the cloud. For these reasons and others, the Court found that a

**Footnotes**

1. 134 S. Ct. 2473 (2014).
2. 395 U.S. 752 (1969).
3. *Riley*, 134 S. Ct. at 2483 (citing *Chimel*, 395 U.S. at 763).
4. 414 U.S. 218 (1973).
5. 556 U.S. 332 (2009).
6. *Riley*, 134 S. Ct. 2484 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
7. *Id.* at 2484-85.
8. *Id.* at 2485-87.
9. *Id.* at 2488-89.
10. *Id.* at 2490.

warrant is generally required before a search of a cell phone seized incident to arrest.[11] In so ruling, the justices rejected several suggestions for a limited authority to search, such as permitting searches of call logs only (as had occurred in *Wurie*) or allowing searches of cell phone data if officers could have obtained the same information from a pre-digital counterpart.

Although the case holds that a warrant is generally required for a search of digital data on a cell phone, the Court was careful to emphasize that other case-specific exceptions may still justify a warrantless search in an individual case. The exigent-circumstances exception could support, for example, a search when a suspect is texting an accomplice about to detonate a bomb, or a child abductor who has information on his cell phone about the child's location.[12] The Court's holding was unanimous, although Justice Alito concurred to state his views about the rationales for the search-incident-to-arrest doctrine and to note that he would be willing to reconsider the question in this case if legislatures assessed the needs of law enforcement and the privacy interests of phone owners, and drew reasonable distinctions based on categories of information or other variables.[13]

*Riley* is an extremely significant ruling, as the Court itself recognized. But it has also spawned a number of questions that courts will need to address. Will evidence be excluded in searches that pre-date *Riley*?[14] Does *Riley* generally prohibit warrantless searches of digital data in devices other than cellular phones?[15] Does the emphasis on the privacy interests in *Riley* indicate that other types of searches of digital data will require an individualized showing?[16] What must be in a warrant authorizing a search of a phone?[17] I suspect that articles reviewing future Terms of the Court will address some of these questions.

**WARRANTLESS ENTRIES TO THE HOME—CONSENT AND CURTILAGE**

Officers have long been entitled to search a home, even a jointly occupied home, if one of the residents consents. Eight years ago, in *Georgia v. Randolph*,[18] the Court held that a warrantless search of a shared dwelling—over the express refusal of consent by a resident who is physically present—cannot be deemed reasonable based upon the consent of another resident. The question in this Term's case, *Fernandez v. California*,[19] was whether the *Randolph* rule applied when one resident granted consent after a non-consenting resident was removed from the premises. When officers came to Fernandez's door, he stated, "You don't have any right to come in here. I know my rights." He was arrested because officers suspected that he had assaulted his co-resident, who granted consent to search an hour later.[20] In a 6-3 opinion authored by Justice Alito, the Court distinguished *Randolph* and found that the search did not violate the Fourth Amendment.

***Riley* is an extremely significant ruling . . . . [b]ut it has also spawned a number of questions that courts will need to address.**

Characterizing *Randolph* as a "narrow exception" to the general rule that a resident of a jointly occupied dwelling may consent to search, the majority emphasized that the physical presence of the objecting resident was essential to the holding in *Randolph*.[21] Fernandez was properly arrested, and "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."[22] The Court rejected the argument that Fernandez's earlier refusal to consent should have remained valid. First, the argument is inconsistent with social expectations; visitors may well decline to enter a home when one resident objects but then return and enter when the objecting resident is not present. Second, the argument raises practical concerns, such as how long the objection remains effective, who is charged with knowledge of the objection, and how a continuing objection should be registered. Finally, denying the other resident the power to consent would fail to honor his or her rights and wishes.[23] Justice Scalia joined the majority opinion but also wrote separately to note his disagreement with the holding in *Randolph* and to address an argument that Fernandez had a right under property law to exclude police.[24]

Justice Ginsburg, joined by Justices Sotomayor and Kagan,

11. *Id*. at 2493.
12. *Id*. at 2494.
13. *Id*. at 2495, 2495-97 (Alito, J., concurring).
14. The California courts upheld the search in *Riley* on the authority of *People v. Diaz*, 51 Cal. 4th 84 (2011). In *People v. Macabeo*, 229 Cal. App. 4th 486 (2014), the California Court of Appeal addressed the admissibility of photographs taken from a cell phone post-*Diaz* but pre-*Riley*. The Court upheld the admission under the principles of *Davis v. United States*, 131 S. Ct. 2419 (2011). *See also* United States v. Spears, 2014 U.S. Dist. LEXIS 94968 (N.D. Tex. July 14, 2014) (same, relying upon pre-*Riley* Fifth Circuit authority). But what happens in jurisdictions in which the law was not settled before *Riley*?
15. *See*, *e.g.*, United States v. Miller, 2014 U.S. Dist. LEXIS 100030 (E.D. Mich. July 23, 2014) (digital cameras); *see also* People v. Michael E., 230 Cal. App. 4th 261, 277-278 (2014) (citing *Riley*, a computer's hard drive is not a "closed container" that officers can search without a warrant merely because a private person has already looked at some parts of the hard drive).
16. *See*, *e.g.*, United States v. Saboonchi, 2014 U.S. Dist. LEXIS 102261 (D. Md. July 28, 2014) (finding that *Riley* does not diminish the scope of the border-search exception; note, however, that the search in the case was supported by reasonable suspicion).
17. *See*, *e.g.*, Hedgepath v. Commonwealth, 2014 Ky. LEXIS 436 (Sept. 18, 2014) (search warrant expressly authorized seizure of cell phones; though the warrant did not limit the parts of the cell phone that could be searched or the files or data that were sought, the clear thrust of the warrant was for evidence related to assaults).
18. 547 U.S. 103 (2006).
19. 134 S. Ct. 1126 (2014).
20. *Id*. at 1130.
21. *Id*. at 1133-34.
22. *Id*. at 1134.
23. *Id*. at 1134-37.
24. *Id*. at 1137 (Scalia, J., concurring). Justice Thomas likewise expressed his disagreement with *Randolph*. *Id*. at 1138 (Thomas, J., concurring).

**In [the dissenters'] view, conjectures about social expectations do not shed light on the constitutionality of the search . . . .**

dissented. They saw the case as a straightforward application of *Randolph*. Fernandez was present when he stated his objection to officers and, one hour later, they "could scarcely have forgotten" that he refused consent.[25] In their view, conjectures about social expectations do not shed light on the constitutionality of the search, given the distinctions between private interactions and police investigations. They also countered the argument that applying *Randolph* to these facts would pose practical problems. In their view, police could readily have obtained a warrant and should have done so. The dissenters "would honor the Fourth Amendment's warrant requirement and hold that Fernandez's objection to the search did not become null upon his arrest and removal from the scene."[26]

*Stanton v. Sims*,[27] a per curiam decision, is interesting because it notes (but does not resolve) a Fourth Amendment question that continues to split the courts. The Court in *Stanton* found that an officer who entered the curtilage of a property while pursuing a misdemeanor suspect was entitled to qualified immunity in a civil-rights action. The justices remarked that "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect."[28] Because the law on this question was not clearly established, the Court summarily reversed the court of appeals and found that the officer should receive qualified immunity.

**TRAFFIC STOPS AND ANONYMOUS TIPS**

*Navarette v. California*[29] addressed the question whether a somewhat spare anonymous tip provided reasonable suspicion to support a traffic stop. A 911 caller reported that a pickup truck had run her off the road. The caller provided a description of the truck, location, and plate number.[30] An officer spotted the vehicle shortly thereafter and followed it for about five minutes before pulling it over. Navarette was the driver of the truck, which contained marijuana. A closely divided Court upheld the stop and thus the subsequent seizure.

Writing for the Court, Justice Thomas noted that by reporting that she had been run off the road, the caller necessarily claimed eyewitness knowledge of Navarette's dangerous driving. This basis of knowledge distinguished the tip held to be insufficient in *Florida v. J.L.*,[31] where an anonymous caller simply reported that a young black male in a plaid shirt at a bus stop was carrying a gun. In providing details about the pickup truck and Navarette's driving, the tip was closer to that upheld in *Alabama v. White*.[32] There, an anonymous tipster told police that a woman would drive from a specific apartment building to a hotel. The tipster described the vehicle and stated that the woman would be transporting cocaine; officers were able to corroborate the innocent details. The *Navarette* Court also pointed out that the identification and tracing features of the 911 system provided additional justifications for reliance on the call. After finding the tip to be sufficiently reliable, the justices concluded that "the behavior alleged by the 911 caller, 'viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion of drunk driving.'"[33]

In a sharply worded dissent, Justice Scalia (joined by Justices Ginsburg, Sotomayor, and Kagan) challenged the majority's conclusion that the tip was reliable as well as the inference that the driver was intoxicated. The dissenters disagreed that the information in the 911 call bore sufficient indicia of reliability, particularly as the identity and location of the vehicle were not based on intimate knowledge. "Unlike the situation in *White*, that generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road."[34] Moreover, the caller did not assert that the driver was drunk. At most, the call conveyed that the driver did some apparently non-typical thing that forced the tipster from the road. Finally, the officer who followed the truck for five minutes did not observe any traffic violations, which should have discredited the claim that the driver was intoxicated. The dissenters suggested that the Court's ruling will be taken to mean that "[s]o long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop."[35]

**DEADLY FORCE AND HIGH-SPEED PURSUITS**

In *Plumhoff v. Rickard*,[36] the justices considered whether officers could be liable for shooting and killing a suspect and passenger during a high-speed car chase. An officer stopped Rickard's car for having only one headlight. When asked for his license, Rickard sped away. Pursued by police, Rickard reached speeds of over 100 miles an hour before eventually leaving the highway and colliding with a police cruiser in a parking lot. Officers approached on foot, but Rickard continued to maneuver his vehicle, and officers fired three shots into the car. When Rickard managed to speed away again, the officers fired 12 more rounds. Rickard and a passenger died from a combination of gunshot wounds and injuries sustained during an ensuing crash.[37] In a

25. *Id.* at 1138 (Ginsburg, J., dissenting).
26. *Id.* at 1144.
27. 134 S. Ct. 3 (2013).
28. *Id.* at 4. The collection of citations in the decision may assist courts addressing the issue.
29. 134 S. Ct. 1683 (2014).
30. It appears that the caller also provided her name. But the recording was not introduced into evidence, and the courts treated the tip as anonymous. *Id.* at 1687 n.1.
31. 529 U.S. 266 (2000).
32. 496 U.S. 325 (1990).
33. *Navarette*, 134 S. Ct. at 1690 (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)).
34. *Id.* at 1692, 1693 (Scalia, J., dissenting).
35. *Id.* at 1692.
36. 134 S. Ct. 2012 (2014).
37. *Id.* at 2019-20.

unanimous opinion by Justice Alito, the Court found that there was no Fourth Amendment violation and that, in any event, the officers would be entitled to qualified immunity from civil liability.[38]

With respect to the Fourth Amendment claim, the Court first revisited *Scott v. Harris*,[39] where the justices found that an officer did not violate the Fourth Amendment by ending a car chase with a technique that put the driver at risk of injury or death. Here, as in *Scott*, "Rickard's flight posed a grave public safety risk," and "the police acted reasonably in using deadly force to end that risk."[40] Next, the Court rejected the claim that even if deadly force was authorized, officers acted unreasonably in firing 15 shots, noting that "during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee."[41]

Finally, even had there been a Fourth Amendment violation, officers would still be entitled to qualified immunity. In *Brosseau v. Haugen*,[42] the Court surveyed lower-court decisions and held that an officer did not violate clearly established law in firing at a fleeing vehicle to prevent harm to officers and citizens in the area. *Brosseau* was not distinguishable on the facts. Moreover, there was no showing that between the time of the shooting in *Brosseau* (1999) and the events in this case (2004), there had emerged either controlling authority or a robust consensus of cases that would alter the analysis.[43]

## FIFTH AMENDMENT

There were no police interrogation cases on the docket this year, in contrast to other recent Terms, though the Court issued a ruling on the privilege against compelled self-incrimination in a different context. There were two additional Fifth Amendment opinions: a per curiam decision reaffirming basic principles of the Double Jeopardy Clause and an interesting opinion about the role of the federal grand jury.

### PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

The self-incrimination case was *Kansas v. Cheever*,[44] where a defendant unsuccessfully argued that the Fifth Amendment prohibited the State from rebutting defense testimony with an expert who had previously examined the accused pursuant to a court order. Cheever had at one point been charged with a federal capital charge. He filed a notice that he intended to introduce evidence relating to methamphetamine intoxication with respect to his ability to form the specific intent required for the charged crime, and the District Court ordered a psychiatric evaluation. The federal charge was subsequently dismissed, and Cheever was prosecuted in state court for the same killing. At his trial, Cheever put forth a defense of voluntary intoxication and introduced expert evidence that his use of methamphetamine had damaged his brain. In rebuttal, the State called the psychiatrist from the federal case, who testified that Cheever had shot the decedent because of his antisocial personality, not because his brain was impaired from drug use. The justices unanimously rejected Cheever's Fifth Amendment claim in an opinion authored by Justice Sotomayor.

**_Martinez v. Illinois_ was a straightforward reaffirmation of the rule that jeopardy attaches when the jury is empaneled and sworn.**

Cheever's argument was based upon an inappropriately narrow reading of two prior decisions, *Estelle v. Smith*[45] and *Buchanan v. Kentucky*.[46] In *Smith*, the use of a court-ordered examination violated the Fifth Amendment where the defendant neither initiated the examination nor put his mental capacity at issue. The *Buchanan* Court had distinguished *Smith* and allowed expert testimony because the defendant had introduced an affirmative defense of extreme emotional disturbance, a mental-status defense. In this Term's case, the justices rejected Cheever's claim that voluntary intoxication is not a mental disease and hence that *Buchanan* would not apply. Instead, the Court made clear that *Buchanan* sets forth a broader rule: "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal."[47] "Any other rule would undermine the adversarial process."[48] Though the Court rejected Cheever's primary Fifth Amendment claim, the case was remanded for the state courts to determine whether the expert's testimony exceeded the proper scope of rebuttal.[49]

In addition to *Cheever*, the justices decided another self-incrimination case, *White v. Woodall*.[50] But *Woodall* is more of a ruling about the scope of federal habeas corpus than the Fifth Amendment and is reviewed in the habeas part of this article.

### DOUBLE JEOPARDY

The Double Jeopardy Clause case, *Martinez v. Illinois*,[51] was a straightforward reaffirmation of the rule that jeopardy attaches when the jury is empaneled and sworn. The defendant's trial was continued numerous times; several of the continuances were due to the State's inability to locate key witnesses. On the morning of trial, the prosecution participated in jury selection and then again moved to continue the trial. The motion was denied. The State told the judge it would not participate in the trial, but the jury was sworn. When the prose-

38. Justices Ginsburg and Kagan both joined as to the judgment but did not join the entire opinion.
39. 550 U.S. 372 (2007).
40. *Id.* at 2022.
41. *Id.*
42. 543 U.S. 194 (2004) (per curiam).
43. *Id.* at 2023 (citations omitted).
44. 134 S. Ct. 596 (2013).
45. 451 U.S. 454 (1981).
46. 483 U.S. 402 (1987).
47. 134 S. Ct. at 601.
48. *Id.*
49. *Id.* at 603.
50. 134 S. Ct. 1697 (2014).
51. 134 S. Ct. 2070 (2014) (per curiam).

**The majority opinion stands as a strong statement about the role of the federal grand jury.**

cution declined to call any witnesses, the defendant's motion for a directed verdict of not guilty was granted. The Illinois Supreme Court held that Martinez was never placed in jeopardy because the State had declared—before the jury was sworn—that it would not participate in the trial.[52] The Supreme Court summarily reversed, rejecting this "functional" approach to Double Jeopardy: "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'"[53] And because "the trial court's action was an acquittal," Martinez could not be retried.[54]

**CHALLENGES TO THE GRAND JURY'S PROBABLE-CAUSE DETERMINATION**

Federal law permits a court to freeze the assets of an indicted defendant if the assets could be forfeited upon conviction. In *United States v. Monsanto*,[55] the Court upheld the constitutionality of such an order so long as it is based upon a finding of probable cause to believe that the property will ultimately be subject to forfeiture. As the justices explained in the most recent decision, *Kaley v. United States*,[56] that finding has two components. There must be probable cause to believe "(1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime."[57] The Kaleys were indicted in federal court for transporting stolen medical devices and money laundering, and the government obtained an order freezing certain assets, including a certificate of deposit that the defendants sought to use to pay their lawyer. They sought a hearing to challenge the first part of the grand jury's determination—that there was probable cause to support the charges themselves. In a 6-3 opinion authored by Justice Kagan, the Court found that the issue raised by the Kaleys "has a ready answer, because a fundamental and historic commitment of our criminal justice system is to entrust those probable cause findings to grand juries."[58]

The majority opinion stands as a strong statement about the role of the federal grand jury. There is "no 'authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof.'"[59] "The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime."[60] We rely upon grand jury determinations to justify other significant decisions, such as depriving suspects of their freedom. And, said the Court, allowing a judicial challenge to the grand jury's probable-cause determination may "have strange and destructive consequences," such as pitting a judge against a grand jury on whether there is probable cause.[61]

The majority also rejected the defendants' claim that they were entitled to a hearing under the Due Process Clause balancing test of *Mathews v. Eldridge*.[62] While the Court did not reach the question of whether *Mathews* applies,[63] the justices concluded that even if it did apply, the defendants would not be entitled to a hearing.[64] The government has a substantial interest in seizing forfeitable assets without a hearing. While the Kaleys have a vital interest in retaining counsel of their choice, an asset freeze resulting in the deprivation of counsel of choice is only erroneous when unsupported by a finding of probable cause. The Court's analysis therefore turned on the probable value of a judicial hearing to uncover a mistaken finding of probable cause. They concluded that a judicial hearing would provide "little benefit" because the probable-cause determination "is not a high bar."[65]

Chief Justice Roberts, joined by Justices Breyer and Sotomayor, wrote a forceful dissent, emphasizing the importance of the Sixth Amendment right to counsel.[66] The Chief Justice did not consider a hearing on the seizure to be "mere relitigation of the grand jury proceedings."[67] "The judge's decision based on the evidence presented at the hearing would have no necessary legal or logical consequence for the underlying prosecution because it would be based on different evidence and used for a different purpose."[68] If the judge sides with the defendants, he will simply hold that the prosecution has not met its burden at that hearing to justify freezing their assets. "The Government may proceed with the prosecution, but the Kaleys will have their chosen counsel at their side."[69] The dissenters were also not persuaded by the majority's *Mathews* analysis.[70] They concluded that the government's concerns were exaggerated, the value of additional proceedings was significant, and the issues "implicate some of the most fundamental precepts underlying the American criminal justice system."[71]

52. *Id.* at 2074.
53. *Id.* (quoting Crist v. Betz, 437 U.S. 28, 35 (1978)).
54. *Id.* at 2076.
55. 491 U.S. 600 (1989).
56. 134 S. Ct. 1090 (2014).
57. *Id.* at 1095.
58. *Id.* at 1097.
59. *Id.* (quoting Costello v. United States, 350 U.S. 359 (1956)).
60. *Id.* at 1098.
61. *Id.* at 1099.
62. *Id.* at 1100.
63. The United States argued that pursuant to *Medina v. California*, 505 U.S. 437 (1992), *Mathews* does not measure the validity of procedural rules that are part of the criminal process. *Kaley*, 134 S. Ct. at 1101.
64. *Id.* at 1101.
65. *Id.* at 1103.
66. *Id.* at 1105, 1107-08 (Roberts, C.J., dissenting).
67. *Id.* at 1108.
68. *Id.* at 1109.
69. *Id.*
70. The dissenters would apply *Mathews* rather than *Medina* because the case is not about rules governing the criminal process but instead concerns the collateral issue of pretrial deprivation of property. *Id.* at 1110 n.4.
71. *Id.* at 1114.

## SIXTH AMENDMENT

*Hinton v. Alabama*[72] provided the justices with an opportunity to apply the performance prong of *Strickland v. Washington*[73] to an attorney error that led counsel to select an unqualified defense expert. Hinton was suspected of killing two restaurant managers during two separate robberies. After being identified as a suspect in a third (non-fatal) robbery, officers arrested Hinton and recovered a .38 caliber revolver. The State's experts concluded that bullets fired in all three robberies came from the same gun. Hinton was charged with two counts of capital murder. The State's case turned on whether its experts could convince the jury that all of the bullets came from the .38. Hinton's lawyer knew he needed a firearms and toolmark examiner. He asked the trial court for funds for an expert, and the court initially authorized up to $1,000, mistakenly believing that that was the limit under state law. In fact, the applicable statute had been amended to permit a request for any reasonable expenses. But counsel did not know that either. He hired the best expert he could find for the money, even though he knew that his expert was not sufficiently qualified. The defense expert was discredited at trial, and Hinton was convicted. In a post-conviction proceeding, Hinton's lawyer presented evidence from three well-qualified experts. All three said that they could not conclude that the bullets were fired from Hinton's gun. In a per curiam opinion, the Court summarily reversed the state courts' denial of relief.

Under the first prong of *Strickland*, "it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000."[74] The "attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point [was] a quintessential example of unreasonable performance under *Strickland*."[75] This was not a case about the "hiring of an expert who, though qualified, was not qualified enough."[76] Rather, the failure was in not understanding the resources that state law made available to counsel, leading him to select an expert that he himself deemed unqualified. The Court remanded for the state courts to assess whether this deficient performance was prejudicial under the second prong of *Strickland*. "[I]f there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted," Hinton would be entitled to a new trial.[77]

## EIGHTH AMENDMENT

This Term's case, *Hall v. Florida*,[78] is an important sequel to *Atkins v. Virginia*,[79] where the Court held that the Eighth and Fourteenth Amendments prohibit the execution of individuals with intellectual disabilities.[80] The Florida Supreme Court interpreted a state statute to require a showing of an IQ of 70 or less to establish an intellectual disability. Florida judicial decisions establish that someone who scores above 70 "does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited."[81] Hall, who was convicted and sentenced to death, challenged the strict IQ cutoff. At a sentencing before *Atkins*, he introduced substantial evidence of disability, including school records and expert testimony. At a post-*Atkins* hearing, he presented the results of nine IQ evaluations over the course of 40 years, but for evidentiary reasons the court excluded the two scores below 70. Applying the 70-point threshold, Hall's *Atkins* claim was rejected. The Supreme Court reversed in a 5-4 decision authored by Justice Kennedy.

**_Hinton v. Alabama_ . . . appl[ied] the performance prong of _Strickland_ . . . to an attorney error that led counsel to select an unqualified defense expert.**

"This rigid rule," the majority held, "creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional."[82] The Court first assessed how Florida's rule comports with medical practices and understandings. The medical community defines intellectual disability by three criteria: "significantly subaverage intellectual functioning, deficits in adaptive functioning . . . , and onset of these deficits during the development period."[83] Florida's rigid rule contravenes established medical practice in two respects: it treats an IQ score as final and conclusive evidence of intellectual disability when experts would consider other evidence as well, and it relies on the single numerical score while not recognizing that the score is imprecise. With respect to the latter point, the Florida statute defines "significantly subaverage intellectual functioning" as performance that is two or more standard deviations from the mean on a standardized intelligence test; with the mean IQ test score of 100, two or more standard deviations from the mean would be a score of approximately 70 points. However, each IQ test also has a "standard error of measurement," or "SEM," reflecting "the inherent imprecision of the test itself."[84] The SEM means that a person's score is best understood as a range. For example, a score of 71 is considered to reflect a range of 66 to 76 with 95% confidence and a range of 68.5 to 73.5 with 68% confidence.[85] Florida's

72. 134 S. Ct. 1081 (2014).
73. 466 U.S. 668 (1984).
74. 134 S. Ct. at 1088.
75. *Id.* at 1089.
76. *Id.*
77. *Id.* at 1089-90.
78. 134 S. Ct. 1986 (2014).
79. 536 U.S. 304 (2002).
80. The term "mental retardation" has been replaced with "intellectual disability." *Hall*, 134 S. Ct. at 1990.
81. *Id.* at 1994 (citation omitted).
82. *Id.* at 1990.
83. *Id.* at 1994.
84. *Id.* at 1995. The reasons why scores may fluctuate can include "the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing." *Id.* (citations omitted).
85. *Id.*

**Writing for the Court, Justice Scalia reviewed basic principles of actual causation.**

strict cutoff of 70 does not take the SEM into account.

The Court then turned to practices in other states and found that "[a] significant majority . . . implement the protections of *Atkins* by taking the SEM into account."[86] After reviewing legislation in the various states and the courts' interpretation of these statutes, as well as post-*Atkins* legislation to abolish the death penalty altogether, the justices concluded that "every state legislature to have considered the issue after *Atkins*—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida."[87] Taking into account the actions of the states, the justices' own independent judgment, and the views of medical experts, the Court found Florida's strict cutoff unconstitutional. "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[88]

Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas, dissented. They disagreed with the majority's analytical framework. To assess "the 'evolving standards of decency that mark the progress of the maturing society,'" one looks to "the standards of *American society as a whole*" and not "the evolving standards of *professional societies*." [89] The dissenters emphasized that state legislation provides the clearest evidence of contemporary values. Of the states that impose the death penalty, they counted 10 as not requiring the SEM to be taken into account, 12 that consider the SEM, and 9 that have not taken a definitive position. "These statistics cannot be regarded as establishing a national consensus against Florida's approach."[90] Justice Alito disagreed with the Court's analysis of the SEM and also concluded that Florida does in fact account for the SEM by permitting defendants to introduce multiple test scores.[91] The dissenters were especially critical of the majority's reliance on the views of professional organizations. They raised a number of concerns, including that "the Court's approach implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change."[92]

## FEDERAL CRIMINAL LAW

As usual, the Term included a number of decisions construing the reach of federal criminal statutes. Two decisions—*Burrage v. United States*[93] and *Rosemond v. United States*[94]—are interesting primers on fundamental aspects of criminal liability. This section of the article reviews these opinions in some detail and then briefly summarizes the holdings in a few other cases.

The issue in *Burrage* was actual causation. Marcus Burrage sold heroin to Joshua Banka, a long-time drug user. Banka died after a night in which he used the heroin plus a host of other drugs. Burrage was charged with drug distribution under a provision containing a 20-year mandatory minimum sentence when "death or serious bodily injury results from the use" of the controlled substance. At trial, medical experts testified that the heroin was a contributing factor in Banka's death, but they could not say whether he would have lived had he not taken the heroin. The statute does not define the term "results from." The Court held that "at least where use of the drug distributed by the defendant is not an independently sufficient cause" of the death or injury, "a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury."[95]

Writing for the Court,[96] Justice Scalia reviewed basic principles of actual causation. A statute providing for liability when a thing "results" usually requires proof that the harm would not have occurred but for the defendant's conduct.[97] The Model Penal Code also "reflects this traditional understanding," stating that conduct "'is the cause of a result' if 'it is an antecedent but for which the result in question would not have occurred'" and this is "'the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result.'"[98] The justices were not persuaded to adopt a different standard due to the difficulty of proving causation in drug-overdose deaths. While several states consider an act or omission a cause-in-fact if it was a "substantial" or "contributing" factor in producing a result, the Court declined to adopt this interpretation of the statute.[99] Congress could have written the statute in these terms had it chosen to do so. Moreover, in light of the rule of lenity, the Court "cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."[100]

*Rosemond* addressed the mental state required for aiding-and-abetting liability. Rosemond was involved in a drug sale. When a would-be purchaser ran away without paying, either Rosemond or a co-felon fired a gun at him. Rosemond was

86. *Id.* at 1996.
87. *Id.* at 1998.
88. *Id.* at 2001.
89. *Id.* at 2001, 2002 (Alito, J., dissenting) (citation omitted; emphasis in original).
90. *Id.* at 2004.
91. *Id.* at 2009-12.
92. *Id.* at 2006.
93. 134 S. Ct. 881 (2014).
94. 134 S. Ct. 1240 (2014).
95. 134 S. Ct. at 892.
96. Justice Alito joined all but one part of the opinion. Justices Ginsburg and Sotomayor joined in the judgment. *Id.* at 892 (Ginsburg, J., concurring in the judgment).
97. *Id.* at 887-88.
98. *Id.* at 888 (quoting Model Penal Code § 2.03(1)(a)).
99. *Id.* (citing State v. Christman, 160 Wash. App. 741, 745 (2011); People v. Jennings, 50 Cal. 4th 616, 643 (2010); People v. Bailey, 451 Mich. 657, 676-678 (1996); Commonwealth v. Osachuk, 43 Mass. App. 71, 72-73 (1997)).
100. *Id.* at 891.

charged under 18 U.S.C. § 924(c) with using or carrying a firearm during and in relation to a drug-trafficking crime. He was tried for the § 924(c) count under alternative theories: either he was the shooter or he aided and abetted the shooter. The case afforded the justices the opportunity to review the scope of aiding-and-abetting liability. The majority ruled that a defendant who does not know that a co-felon is bringing a gun to a drug sale may not be convicted of aiding and abetting the co-felon's act of using or carrying the firearm.

Justice Kagan's opinion for the Court begins with the *actus reus* of the offense. "The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture."[101] Rosemond's participation in the drug deal satisfied the affirmative-act requirement. But "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime."[102] The intent must reach beyond a simple drug sale to an armed drug sale. "An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c)."[103] That intent will be satisfied when an active participant in a drug transaction knows that a confederate will carry a gun. In that case, the accomplice has decided to join in the venture with full awareness of its scope. However, for that to be true, the accomplice must know of the firearm in advance, so he can make the relevant legal and moral choice. It must be "knowledge at a time the accomplice can do something with it—most notably, opt to walk away."[104] The Court rejected Rosemond's claim that liability should only attach if an accomplice affirmatively wants a confederate to use a gun; it is enough that the defendant has, with full knowledge, chosen to participate in the scheme.

Justice Alito, joined by Justice Thomas, agreed with much of the majority's opinion but strongly disagreed with the conclusion that a conviction requires an aider and abettor to have a realistic opportunity to refrain from engaging in the criminal conduct. In his view, this rule represents an "unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally."[105] He wrote that the majority converted what was an affirmative defense into a part of the required *mens rea* for the offense.

Two other decisions are worth noting. *Paroline v. United States*,[106] like *Burrage*, addresses causation, but in a narrower context. The majority in *Paroline* held that a defendant convicted of possession of child pornography could be ordered to pay restitution to the child depicted in the photographs only for those losses proximately caused by the defendant's offense conduct. To determine the proper amount of restitution, "a court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses."[107] And in *Bond v. United States*,[108] the Court found that the Chemical Weapons Convention Implementation Act of 1998 does not reach "a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover" by spreading chemicals on a mailbox, car door, and doorknob, "which ended up causing only a minor thumb burn readily treated by rinsing with water."[109] The majority construed the Act not to apply, insisting "on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[110] Three justices concurred in the judgment; they would have gone further and found the application of the Act unconstitutional.[111]

**[Rosemond v. United States] afforded the justices the opportunity to review the scope of aiding-and-abetting liability.**

## HABEAS CORPUS

In several recent Terms, the Court has emphasized the limited scope of federal habeas corpus review. The 2011-2012 Term, for example, was marked by six summary reversals of lower-court decisions that had granted habeas corpus relief to state inmates.[112] There were two significant cases this Term, *White v. Woodall*[113] and *Burt v. Titlow*,[114] that again underscored the limited nature of federal habeas review.

Woodall pleaded guilty to capital charges. At his penalty-phase trial, he called character witnesses but did not testify himself. His lawyer asked the trial judge to instruct the jury that the defendant is not compelled to testify and that he should not be prejudiced by the decision not to testify. In a 6-3 opinion written by Justice Scalia, the *Woodall* Court found that while a previous case, *Carter v. Kentucky*,[115] required a no-adverse-inference instruction at the *guilt* phase, prior decisions from the Supreme Court did not clearly establish such a right at the *penalty* phase. Thus, the state court's decision was not "contrary" to clearly established federal law as determined by the Supreme Court. Nor was the state court's holding an unrea-

101. 134 S. Ct. 1240, 1246 (2014).
102. *Id.* at 1248.
103. *Id.*
104. *Id.* at 1249-50.
105. *Id.* at 134 S. Ct. 1252, 1253 (Alito, J., concurring in part and dissenting in part).
106. 134 S. Ct. 1710 (2014).
107. *Id.* at 1727-28.
108. 134 S. Ct. 2077 (2014).
109. *Id.* at 2083.
110. *Id.* at 2090.
111. *Id.* at 2094 (Scalia, J., concurring in the judgment). Justices Thomas and Alito joined this concurrence.
112. *See* Charles D. Weisselberg, *GPS Monitoring and More: Criminal Law Cases in the Supreme Court's 2011-12 Term*, 48 COURT REV. 60, 71 (2012).
113. 134 S. Ct. 1697 (2014).
114. 134 S. Ct. 10 (2013).
115. 450 U.S. 288 (1981).

**So far, the October 2014 Term is a bit light on criminal cases. But there are a few worth noting.**

sonable application of Supreme Court precedent. To obtain habeas relief on that ground, a petitioner must show that the state court's ruling "was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement."[116] There was no such error here. "The appropriate time to consider the question [of an instruction at the penalty phase] as a matter of first impression would be on direct review, not in a habeas case governed by [28 U.S.C.] § 2254(d)(1)."[117] Justices Breyer, Ginsburg, and Sotomayor dissented, arguing that *Carter* and *Estelle v. Smith*[118] together compelled a no-adverse-inference instruction at the penalty phase of a capital trial.[119]

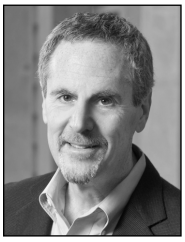
In *Burt v. Titlow*, the Sixth Circuit found that Titlow was entitled to habeas corpus relief due to the ineffective assistance of her second lawyer, who had advised her to withdraw her guilty plea and go to trial. According to the Circuit, the state court's reason for finding no ineffective assistance—that the withdrawal of the plea followed Titlow's assertion of innocence—was based upon an unreasonable interpretation of the factual record. The Supreme Court disagreed, applying the "doubly deferential" standard of review of an ineffective-assistance-of-counsel claim on federal habeas corpus. In an opinion by Justice Alito, the Court found that the record supported the state court's factual finding that the new lawyer advised withdrawal of the plea only after a claim of innocence. After accepting that factual determination, the Circuit's ineffective-assistance-of-counsel analysis could not be sustained. "Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland [v. Washington]*, it may affect the advice counsel gives."[120] The state court's conclusion that the advice satisfied *Strickland* fell within the bounds of reasonableness under the federal habeas corpus statute.[121]

## A LOOK AHEAD

So far, the October 2014 Term is a bit light on criminal cases. But there are a few worth noting.

One well-publicized case, *Elonis v. United States*,[122] arose from the defendant's postings on Facebook; the legal issue is whether a conviction for threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten. A Confrontation Clause case is on the docket. The issue in *Ohio v. Clark*[123] is whether a child's statements to a daycare teacher, who has a mandatory duty to report suspected child abuse, are testimonial within the meaning of the Confrontation Clause. Another significant case is *Rodriguez v. United States*,[124] which concerns whether an officer was lawfully entitled to extend an already-completed traffic stop to bring in a narcotics-detection dog. The case may be important if it generally addresses extensions to these stops. *Heien v. North Carolina*,[125] another traffic-stop case, asks whether a stop violates the Fourth Amendment where the police officer's reasonable suspicion is based upon a mistaken interpretation of law. Finally, *Yates v. United States*[126] is—hands-down—the most entertaining criminal-law case of the Term thus far. There the issue is whether a defendant can be prosecuted under the "anti-shredding" provisions of the Sarbanes-Oxley Act for throwing purportedly undersized grouper from his commercial fishing boat to avoid being sanctioned for catching undersized fish. Yes, fish. Grouper.

Fish or no fish, it will be an interesting Term.



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116. 134 S. Ct. at 1702 (quoting Harrington v. Richter, 131 S. Ct. 770, 787-88 (2011)).
117. *Id.* at 1707.
118. 450 U.S. 288 (1981).
119. *Id.* at 1707, 1710 (Breyer, J., dissenting).
120. 134 S. Ct. at 17 (citing Strickland v. Washington, 466 U.S. 668 (1984)).
121. Justice Sotomayor concurred and noted that Titlow failed to present sufficient evidence about counsel's advice to warrant habeas corpus relief. *Id.* at 18 (Sotomayor, J., concurring). Justice Ginsburg concurred in the judgment due to a practical inability to re-offer the same plea bargain as before. *Id.* at 19 (Ginsburg, J., concurring).
122. No. 13-983.
123. No. 13-1352.
124. No. 13-9972.
125. No. 13-604.
126. No. 13-7451.